IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY, Plaintiffs-Appellants, vs. CITY OF HAPPY VALLEY, a municipal corporation, et al., Defendants-Appellees.	No. 80-3158 D.C.# CV 78-476 MEMORANDUM

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding
Argued and submitted September 10, 1981

Before: SCHROEDER and NELSON, Circuit Judges, and JAMESON*, District Judge

Plaintiffs argue that an alleged deprivation of rights to develop their property following passage by the Oregon

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

legislature of the Comprehensive Land Use Statute of 1973[1/] amounts to a taking of that property by the City of Happy Valley for a public use without compensation, in violation of the fifth and fourteenth amendments.

The comprehensive plan covering plaintiffs' property has not yet become final. Throughout the course of this litigation, plaintiffs have simultaneously sought an "urban" classification through state administrative proceedings. The city has consistently advocated a classification which would limit residential development to a lesser density than that desired by plaintiffs. Plaintiffs urge that the failure to adopt the higher density urban classification

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1/ S.B. 100, currently codified at Or. Rev. Stat. Ch. 197 (1977).

constitutes a permanent or at least a temporary taking, without the compensation required by the fifth and fourteenth amendments.

The district court abstained under the doctrine enunciated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643 (1941), as applied by this court in Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F. 2d 1092 (9th Cir. 1976). The district court was of the view that abstention was appropriate because of the importance and difficulty of state law questions regarding the extent of the property rights allegedly interfered with by the regulation.

At the time that the district court considered the case, the law with respect to inverse condemnation by government regulation was in its infancy. However,

the Supreme Court has since decided Agins v. City of Tiburon, 447 U.S. 255 (1980). That decision compels the conclusion that plaintiffs have failed to state a claim upon which the federal court can grant relief. The complaint must therefore be dismissed.

Under Tiburon, plaintiffs cannot maintain that they are constitutionally entitled to an urban classification. The classification advocated by the city is essentially the same as that considered by the Supreme Court in Tiburon. The Court held that a zoning ordinance which so limited residential development did not amount to a taking. Thus even if the classification ultimately adopted is that advocated by the city, there will be no taking.

Plaintiffs also claim damages for a temporary taking, alleging that delays in

approval of the comprehensive plan have prevented any development because adequate sewers cannot be installed under the interim plan. The Supreme Court also dealt with this issue in Tiburon, stating that absent bad faith or unreasonable delay, a city's planning activities, even those which culminate in an actual condemnation, do not in and of themselves amount to a taking. Plaintiffs' allegations with respect to the city's refusal to install sewers as a means to limit development density, and its delays in connection with approval of the plan -- many of which are directly attributable to appellants' participation in the administrative process -- do not come within the narrow exceptions enumerated in Tiburon.

The matter is remanded to the district court with instructions to dismiss the complaint.

APPENDIX B

B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO; DELMER EISERT; and ROBERT AND AGNES GUY,	
Plaintiffs,	Civil No. 78-476
v.	ORDER
CITY OF HAPPY VALLEY, a municipal corporation, et al.,	
Defendants.	

Plaintiffs have filed objections to Judge Leavy's Findings and Recommendation dated November 26, 1979. After a de novo review, I agree with Judge Leavy that Pullman[1/] abstention is appropriate in this case.

1/ Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941). Under Pullman abstention, the federal court retains jurisdiction but stays the action in order to provide the state court the opportunity to decide the underlying questions of state law.

In Canton v. Spokane School District, No. 81, 498 F. 2d 840, 845 (9th Cir. 1974), the Court held that Pullman abstention is appropriate when:

> (1) The complaint touches a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open;
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and
>
> (3) The possibly determinative issue of state law is doubtful.

This case meets the three part Canton test.

Sensitive Area of Social Policy.

Plaintiffs contend that defendants have deprived them of the right to use and develop their land as an economic commodity. They seek monetary damages based on the theory that the totality of

defendants' actions constitute a "taking" of their property.

Plaintiffs' complaint raises land use planning questions. It is settled law that land use planning is a sensitive area of social policy for purposes of the Pullman doctrine. Isthmus Landowners Ass'n v. State of California, 601 F. 2d 1087 (9th Cir. 1979).

Avoidance of Constitutional Adjudication

Plaintiffs contend that their complaint does not raise questions of state law, but is framed squarely on federal law. They contend that they have an inherent right to use and develop their land as an economic commodity, and that the Fifth Amendment to the United States Constitution presumes such rights, subject only to the nuisance doctrine, and a limited right of the states to legislate

the manner in which property is used in order to promote the public welfare. Plaintiffs do not contend that defendants' actions necessarily violated state land-use laws or regulations, but contend only that the cumulative effect of defendants' actions, regardless of their lawfulness, constituted a "taking" under the Fifth Amendment for which plaintiffs are entitled to compensation. Therefore, argue plaintiffs, there are no state law questions involved in this case.

While the issue of what constitutes a taking under the Fifth Amendment is a federal question, federal courts look to state law to determine what property rights exist. Richmond Elks Hall Ass'n v. Richmond Development Agency, 561 F. 2d 1327, 1330 (9th Cir. 1977). The same is true of property rights under the due process and equal protection clauses of the Fourteenth

Amendment. Rancho Palos Verdes Corporation v. City of Laguna Beach, 547 F. 2d 192 (9th Cir. 1976). Therefore, whether a taking has occurred depends upon whether, under state law, plaintiffs have a right to the unrestricted development of their land as an economic commodity. Furthermore, if such right does exist, the question remains whether they are entitled to money damages resulting from the deprivation of those rights.

Unsettled Nature of State Law.

Plaintiffs contend that they have a right to inverse condemnation whether or not the taking is temporary or permanent.2/ There is no question that, under Article I,

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2/ Plaintiffs are seeking permission to develop their land through state agency proceedings. Even if they are successful in obtaining the right to develop their land, they argue they are entitled to damages for the ten year period during which they were denied that right.

section 18 of the Oregon Constitution, the designation of certain property for future public use can constitute a taking if, in the interim, the property owner is deprived of all economically feasible uses of the property. Fifth Avenue Corp. v. Washington County, 282 Or. 591, 610 (1978). However, the state courts have yet to address whether a temporary loss of the right to develop property gives rise to an action for inverse condemnation. Furthermore, the Oregon Supreme Court has not expressly stated that Oregon's constitutional taking clause is a mirror-image of its federal counterpart. See Stephens v. Tielsch, 502 F. 2d 1360 (9th Cir. 1974).

Here, the outcome of the state proceedings may render plaintiffs' claim under the United States' Constitution moot. Under Pullman abstention, plaintiffs have the opportunity of submitting all the

state and federal questions to the state court for final adjudication, or reserving the federal question for decision in this court should the state proceedings not dispose of it. Given the nature of the subject matter involved in this case, and the possibly dispositive, though unsettled issues of state law involved, Pullman abstention is appropriate.

Judge Leavy's Findings and Recommendation is affirmed. It is hereby ordered that this court retain jurisdiction but stay the federal case pending adjudication of the state law questions in state court.

Dated this 16th day of April, 1980.

/s/James A. Redden
James A. Redden
United States District
Judge

APPENDIX C

C-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	)	
Plaintiffs-Appellants,	)	No. 80-3158
vs.	)	ORDER
CITY OF HAPPY VALLEY, a municipal corporation, et al.	)	
Defendants-Appellees.	)	

Before: SCHROEDER and NELSON, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc,

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

D-1

EXCERPTS FROM PLAINTIFFS' COMPLAINT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	
Plaintiffs,	Civil No. 78-476
vs.	COMPLAINT FOR INVERSE CONDEMNATION AND CIVIL RIGHTS DAMAGES
CITY OF HAPPY VALLEY, et al	
Defendants.	DEMAND FOR JURY TRIAL

Plaintiffs allege:

1

This is an action for compensatory, consequential and exemplary relief pursuant to Title 42 USC §§1983, 1985(3) and 1986; and arising under the provisions of the constitution and laws of the United States, as more fully set forth hereinafter.

24

The City of Happy Valley was incorporated in 1965. The purpose of the incorporation was defensive and was designed to insulate lands incorporated from development pressures and to prevent annexation of the territory by the City of Portland.

31

All residences within the City of Happy Valley utilize septic tanks for sewage disposal. Prior to incorporation of the city, residents of the area became aware of pollution of ground water in the Kellogg Creek drainage basin caused by malfunctioning septic tank systems. The Clackamas County Health Department repeatedly informed the city and the Department of Environmental Quality of malfunctioning septic tanks and the health hazards involved. The USDA Soil

Conservation Service conducted soil tests within Happy Valley in 1972 and concluded that lands within the city were generally unsuitable for subsurface sewage disposal.

32

In December of 1972 and in March of 1973, the Department of Environmental Quality conducted sanitary surveys within the city and concluded that a serious public health hazard existed and recommended that sewers be installed to correct the problem. In March 1973, the city council commissioned an engineering consultant firm to conduct soil surveys to determine alternative remedies to the installation of sanitary sewers. In March 1974, the City of Happy Valley transmitted its own report on sewage disposal problems, which recommended that health hazards could be removed without the installation of sanitary sewers. The

City of Happy Valley requested that the DEQ defer enforcement actions against individual owners of failing septic tanks within the City of Happy Valley.

33

The City of Happy Valley conducted a tour of the city for DEQ officials in the summer of 1975 in preparation for a public meeting between DEQ officials and city residents. The public meeting among DEQ officials, Happy Valley officials and Happy Valley residents occurred on September 15, 1975. Thereafter, it was determined that Happy Valley would pursue a facilities plan under an Environmental Protection Agency grant as a means of remedying sewage disposal problems.

34

Defendants acted individually and in concert, under color of state law, to prevent the enforcement of state health

regulations against owners of failing septic tank systems within the City of Happy Valley. Individual Defendants used their offices to influence public officials charged with the maintenance of water quality to postpone an area-wide solution to Happy Valley's sewage treatment problems in order to prevent urban development within the city.

37

The City of Happy Valley failed to complete its facilities plan in accordance with the projected schedule. The Environmental Quality Commission (hereinafter "EQC") by order of May 27, 1977, directed the City of Happy Valley to complete its facilities plan within six months of the land use designation by CRAG, which occurred on May 26, 1977.

38

The City of Happy Valley failed to

complete its facilities plan within the time schedule fixed by EQC order. The city continued to maintain a public position that the facilities plan could not be completed until allegedly conflicting policy directives among state agencies could be resolved. Mayor Robnett requested a time extension on December 6, 1977, until June 1, 1978, for completion of the facilities plan because of unresolved land use density questions. By order of February 17, 1978, the EQC imposed a third schedule for the completion of the facilities plan by June 1, 1978, or six months following the adoption of essential land use plans by the city. The city has not followed the projected schedule and will not have completed its facilities plan by June 1, 1978.

39

Defendants acted individually and in concert, under color of state law, to delay selection of a comprehensive solution to sewage disposal problems within the city through the facilities planning process. Individual Defendants have used their offices to manipulate public sentiment against installation of sanitary sewers to remedy city-wide health problems. Defendants further obtained a "rural" regional land use designation for the city in order to prevent installation of sanitary sewers, as will be set forth more fully below.

40

In March 1970, Mayor Robnett addressed the planning commission to request that stricter development controls be formulated in order to retain the rural atmosphere of the city. The city adopted a zoning ordinance on

August 10, 1970, which established a single use district (R-20) for single-family residences. All of the property presently belonging to plaintiffs was classified as R-20.

41

In 1968 the city council directed the planning commission to proceed with the development of a comprehensive plan for the city. The consultant firm of CH2M was retained by the city in March 1972 to formulate a comprehensive plan. The comprehensive plan was adopted unanimously at a special meeting of the city council on May 29, 1973. Revisions were adopted in December 1973.

42

The comprehensive plan for the city identified 430 acres of land as "existing development"; 675 acres as farm land or potential development; and 275 acres as

open space (park, school and undisturbed hillside). The comprehensive plan projected an ultimate population density of over 6,000 persons and assumed that the city might ultimately be sewered. The plan also prescribed minimum lot sizes on the basis of soil suitability for sub-surface sewage disposal. Minimum lot sizes were developed on the assumption that sewers would be ultimately installed. The plan contemplated the development of a planned unit development (PUD) ordinance.

43

Substantial portions of Plaintiffs' property were classified as "open space" on comprehensive plan maps and the remainder was classified as "suitable for development."

44

The planning commission considered development of a PUD ordinance on June 7,

1971, and passed a motion endorsing such an ordinance in concept on October 4, 1971, with the understanding that the ordinance would be developed after joint discussion with the city council. The city council discussed the adoption of a PUD ordinance on November 22, 1971, wherein the city attorney recommended that no PUD ordinance be developed until sanitary sewers were installed. The City of Happy Valley has not adopted a PUD ordinance.

45

Plaintiffs' property is generally unsuitable for subsurface sewage disposal. Eighty-one percent of the sites evaluated since 1973 for septic tank approval in Section 27 have been denied under subsurface sewage disposal requirements adopted by the DEQ; 85% of the sites in Section 35 have been denied since 1973.

46

In failing to provide for alternative sewage disposal methods for residential use in the comprehensive plan for the city and in failing to provide for cluster housing through a PUD ordinance, Defendants have denied Plaintiffs all use of their property for residential purposes.

47

The City of Happy Valley adopted a building code and incorporated the 1955 Clackamas County subdivision ordinance as ordinance 1 in 1965. During the 1973 legislative session, Oregon substantially revised its subdivision laws. Clackamas County subsequently adopted a new subdivision ordinance, which was reviewed by the planning commission for the city on September 24, 1973. The planning commission approved the ordinance in concept and resolved to revise the city

ordinance accordingly. The planning commission initiated subdivision ordinance revision on March 10, 1975. The City of Happy Valley has never adopted a revised subdivision ordinance.

48

The city contracted with Clackamas County for review of subdivision plat applications and building permit applications. The planning commission for Happy Valley and the city council also reviewed these applications and was responsible for approval of subdivision plats. Happy Valley has approved two subdivision applications since its incorporation. Since 1970 (excluding 1978), the city has issued 66 building permits, constituting 14.4% of the city's housing stock.

50

The city adopted a partitioning

ordinance governing the division of land into three or fewer parcels on June 24, 1976 (Ordinance 65). On September 7, 1977, the city council enacted a moratorium on partitioning of lands within the city and suspended operation of Ordinance 65 until the revised comprehensive plan for the city was adopted. Upon inquiry by Plaintiffs, the city revised the moratorium resolution to apply to the subdivision of land on May 2, 1978.

51

Plaintiff Mas Fujimoto submitted a subdivision proposal to the city council on February 14, 1972, which proposal was not acted upon by the city. Mr. Fujimoto submitted an application for subdivision on February 23, 1976, and received an "advisory opinion" by the planning commission that the application was improper. Plaintiffs Robert and Agnes Guy

requested the city's approval for annexation to Clackamas County Service District No. 1 for the purpose of obtaining sanitary sewer service for their property, which request was denied.

52

Each of the Plaintiffs submitted two sets of subdivision proposals drafted in accordance with the specifications for preliminary plats under the Clackamas County subdivision ordinance at the meeting of the Happy Valley planning commission on March 27, 1978. One set of tentative plans detailed standard subdivision plats while the second set outlined planned unit developments. The planning commission deferred review of the plans pending judgment of the city council. The Happy Valley city council refused to accept the proposals on April 3, 1978, and revised the moratorium

on partitioning to include subdivisions on May 2, 1978.

53

Defendants acted individually and in concert, under color of state law, to thwart residential and commercial construction within the city limits of Happy Valley through a pattern and practice of denying subdivision and building permit applications and by the failure to revise and update the city's subdivision ordinance. Defendants have further imposed a moratorium on development within the city which precludes approval of subdivision applications submitted by Plaintiffs.

54

The City of Happy Valley lies within an urbanizing corridor on the west by Interstate Highway I-205, on the north by the City of Portland, and on the south by

the Sunnyside district, an unincorporated area which has experienced rapid residential development. The city is within close commuting distance of the Clackamas River industrial district, the Kaiser Hospital complex and the proposed regional shopping center known as the Town Center. The city has a full range of urban services, with the exception of public transit and sanitary sewers. The city receives state tax revenues on the basis of its certification that it provides at least five municipal services.

55

In May 1975, CRAG initiated the process of adopting a regional land use framework element. All areas of the metropolitan Portland region were classified as urban areas, rural areas or natural resource areas. Classification was made on the basis of projected

populations for subareas of the region and upon housing densities. The City of Happy Valley was mapped as an urban area.

56

On September 24, 1975, a public meeting was held in Happy Valley to present the regional classifications. By letter of November 17, 1975, the city requested a new classification permitting rural residential uses. The CRAG staff subsequently changed its recommendation that Happy Valley be declared an urban area and the city was classified as rural on the draft regional map. From March through December of 1976, the CRAG Board of Directors conducted mark-up sessions concerning the land use framework plan. Throughout the mark-up sessions, the City of Happy Valley advocated a rural classification for the city and urged residents to support its position before

the regional body. The city urged that an urban classification would engender rapid urbanization for the city and force compulsory sewering to remedy existing sewage disposal problems. On December 16, 1976, the CRAG Board of Directors classified Happy Valley as a "study area" and authorized the preparation of a consultant's report to determine the issue of whether Happy Valley should be declared urban or rural. Plaintiffs participated throughout the mark-up sessions and advocated an urban classification for the city.

57

On December 22, 1976, CRAG adopted the land use framework element of the regional plan. The text of the element provided that all cities within the regional urban growth boundary were to be classified as immediate growth areas (in contrast to future urbanizable areas).

All other cities in the region were classified as urban areas on the regional map. The framework element text also provided that sewers could not be extended into areas classified as rural unless "required to alleviate a public health hazard or water pollution problem in an area officially so designated by the appropriate state agency."

58

The consultant's report on Happy Valley concluded that an urban designation for the city would better comply with CRAG objectives than a rural designation. The CRAG staff recommended that Happy Valley be declared a future urbanizable area on the regional map. On April 21, 1977, CRAG held a public hearing concerning the consultant's report. Defendant officials of Happy Valley and other residents presented orchestrated

oral testimony in support of a rural classification, alleging that city residents would be forced to accept sanitary sewers and would be burdened with the costs of urbanization. Plaintiffs presented oral and written testimony in behalf of an urban classification. The CRAG Board of Directors deferred its decision until May 26, 1977, at which time Happy Valley was classified as rural on the regional map.

59

On July 21, 1977, Plaintiffs appealed the decision of the CRAG Board of Directors on grounds that the classification violated statewide planning Goals 2 (land use planning), 10 (housing), 11 (public facilities) and 14 (urbanization). By order of May 2, 1978, the Land Conservation and Development Commission invalidated the CRAG resolution declaring

Happy Valley as rural, rendering the city as unclassified under the regional plan.

60

Defendants acted individually and in concert, under color of state law, to obtain a rural classification for the city under the regional land use plan in order to prevent the urbanization of the city and the installation of sanitary sewers as an area-wide solution to the existing sewage disposal problems. Individual Defendants used their offices to manipulate public sentiment in behalf of a rural classification and influenced public officials charged with regional responsibilities to relieve city officials from land use responsibilities associated with the urbanization process.

61

In 1973, the Oregon Legislative

Assembly enacted SB 100, which created a Land Conservation and Development Commission and which required all cities and counties to adopt or revise comprehensive plans and implementing ordinances in order to comply with statewide planning goals promulgated by the agency within one year from the adoption of such goals. In December 1975, LCDC adopted fourteen statewide planning goals and accompanying guidelines.

62

In February 1976, the city requested a temporary planning extension in order to evaluate its comprehensive plan and ordinances for compliance with the statewide goals. The council appointed a citizens advisory committee to undertake the evaluation. In its initial report to the LCDC, the city determined that the urbanization goal was inapplicable because

the city was a rural residential area. LCDC granted a planning extension until October 1, 1976, to the city on the condition that it address the urbanization goal in its work program and compliance schedule.

66

By letter of October 14, 1977, the city council declared that a second vote on population density would be taken and distributed questionnaires to city residents. Out of 215 questionnaires returned, 63 ballots favored 2 1/2 acre lot sizes; 37 favored 1 1/2 acre lot sizes; 49 favored one acre lot sizes; 31 favored 3/4 acre lot size; and 33 specified "other." At the November 1977 meeting of the city council, the council adopted a 1.5 acre minimum average lot size for the city.

72

On August 18, 1977, Plaintiffs

petitioned the Portland Metropolitan Area Local Government Boundary Commission for withdrawal of their property from the City of Happy Valley for the purposes of obtaining sanitary sewer service from Service District No. 1. Plaintiffs requested the City of Happy Valley's approval of this action at the city council meeting of September 7, 1977. The city submitted the matter to a vote of participants in the public meeting of September 20, 1977, without explanation of the proposal and without providing an opportunity for Plaintiffs to explain the proposal to the public.

73

The City of Happy Valley opposed withdrawal from the city before the boundary commission during public hearings. The boundary commission staff report substantiated that Plaintiffs' properties

would be fully serviced upon withdrawal from the City of Happy Valley and annexation to the Service District. By Order of November 16, 1977, the boundary commission denied Plaintiffs' petitions without prejudice for the reason that CRAG had not acted upon the Plaintiffs' amendments to the regional plan.

74

In August 1977, Plaintiffs petitioned CRAG to amend its land use framework element map to redesignate their properties from rural to urban. The purpose of the proposed amendments was to enable Plaintiffs to withdraw land from the city in order to annex to Service District No. 1 to obtain sanitary sewer service. The City of Happy Valley opposed the amendments at the quasi-judicial hearings scheduled by CRAG, and the CRAG Board of Directors denied Plaintiffs' petitions

in December 1977.

75

Defendants have acted individually and in concert, under color of state law, to frustrate the attempts of Plaintiffs to withdraw land from the City of Happy Valley in order to obtain sanitary sewer service.

76

Soil characteristics of Plaintiffs' property renders the property unsuitable for agricultural or forestry production. Residential construction on Plaintiffs' property cannot be undertaken without adequate means of sewage disposal. Plaintiffs' property is unsuitable for subsurface sewage disposal, the only method of sewage disposal authorized under the existing comprehensive plan.

77

Defendants acting individually and

in concert have prevented Plaintiffs from acquiring alternative means of sewage disposal for their property. Consequently, Defendants have deprived Plaintiffs of all reasonable uses for the property. Plaintiffs continue to pay property taxes for the property.

78

Aforesaid acts of Defendants have deprived Plaintiffs of all value of their property in the following amounts:

Mas Fujimoto	$ 600,000
Delmer Eisert	$ 480,000
Robert and Agnes Guy	$ 600,000

79

Plaintiffs have suffered consequential damages in the amount of $30,000.

80

Said acts of Defendants were done maliciously, wantonly, for oppressive

reasons and in bad faith, and with the intent to injure and damage Plaintiffs, and Plaintiffs are entitled to punitive damages in the amount of $600,000.

A. First Cause of Action: Inverse Condemnation

82

Defendant City of Happy Valley, acting through Defendant officers and agents, have deprived Plaintiffs of all value of their property without compensating them therefor, in violation of the Fifth Amendment of the United States Constitution as incorporated by the Fourteenth Amendment.

B. Second Cause of Action: §1983

84

Defendants Robnett, Stuck, Cannard, Coats, Shaffer, Ross, Grady, Schneider, Quick, Gustaffson, Bye and Frey, acting under color of state law and municipal ordinance, have used their offices to

willfully, wantonly and maliciously deprive Plaintiffs of their rights and privileges to enjoy and use their property as secured by the constitution and laws of the United States, in violation of 42 USC §1983 and the Thirteenth Amendment of the United States Constitution.

E. Fifth Cause of Action: Fifth Amendment Injuries

Defendant City of Happy Valley, together with Defendants Robnett, Stuck, Cannard, Coats, Shaffer, Ross, Grady, Schneider, Quick, Gustaffson, Bye and Frey, acting individually and in concert, with malice and deliberate disregard of Plaintiffs' civil rights, have deprived Plaintiffs of their rights and privileges to use and enjoy their property as they see fit, in violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United

States Constitution.

WHEREFORE, Plaintiffs pray for a decree:

(1) Awarding Plaintiffs the value of their property of which they have been deprived in the following amounts:

Mas Fujimoto	$ 600,000
Delmer Eisert	$ 480,000
Robert and Agnes Guy	$ 600,000

(2) Awarding Plaintiffs consequential damages in the amount of $30,000;

(3) Awarding Plaintiffs punitive damages in the amount of $600,000;

(4) Awarding Plaintiffs' reasonable attorneys' fees plus all costs and disbursements incurred herein; and

(5) Such other relief that the court may deem appropriate.

MORGAN & SHONKWILER

By /s/Terry D. Morgan
Terry Morgan
Of Attorneys for
Plaintiffs

EXHIBIT E

E-1

EXHIBIT 7
OF
PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Terry D. Morgan
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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO; DELMER EISERT; and ROBERT and AGNES GUY,	)	Civil No. 78-476
Plaintiffs,	)	
vs.	)	AFFIDAVIT OF TERRY D. MORGAN
CITY OF HAPPY VALLEY, a municipal corporation, et al,	)	
Defendants.	)	

STATE OF OREGON)
: ss
County of Multnomah)

I, TERRY D. MORGAN, being duly sworn, do depose and state:

1. I am attorney for Plaintiffs in the above captioned matter.

2. Attached hereto as Exhibit A is the report of R. J. Frank & Associates, a real estate consultant firm retained by Plaintiffs for the purpose of appraising the impact of Defendants' regulations upon Plaintiffs' property. The exhibit consists of a letter from Mr. V. Hugh LeGall, a member of the Society of Real Estate Appraisers; and an unsigned report prepared by Curtis Richard Close, member of the American Institute of Planners. Mr. LeGall's letter, dated May 9, 1979, sets forth the methodology for determining the value of the option taken by the City on Plaintiffs' property. Mr. Close's report concludes that the City's present regulatory scheme precludes economic use of Plaintiffs' property.

Terry D. Morgan

SUBSCRIBED AND SWORN to before me this ____day of May, 1979.

Nelly Ponce
Notary Public for Oregon
My Commission Expires: 8/3/80

(NOTARIAL SEAL)

EXHIBIT A

R. J. FRANK & ASSOCIATES
6625 N.E. 82nd Avenue
P. O. Box 20517
Portland, Oregon 97220
(503) 255-0020

May 9, 1979

Mr. Terry Morgan, Attorney at Law
Morgan & Shonkwiler
2111 N.E. 43rd Avenue
Portland, Oregon 97213

Re: Fujimoto, Eisert, and Guy Properties
Tax Lots 100, 500, 1700, 1800, 1801
and 2300 in Section 35, T1S, R2E,
and Tax Lot 900, Section 27 CB,

T1S, R2E, W.M., in the City of Happy Valley, Multnomah County, Oregon.

Dear Mr. Morgan:

According to your request I have reviewed the information you supplied relating to the referenced properties, and I have considered the problem of valuing the loss to the owners that results from being deprived of the use of the property.

Mr. Close of our office has concluded that under the prevailing conditions no reasonable economic use remains to these properties. I have reviewed his work and concur in his opinion.

The method of estimating the value of the lost property rights is as follows:

1. Determine highest and best use.
2. Estimate by comparable land sales the market value of the subject immediately prior to the date of taking.

3. Using market value as a base, determine a fair rental for the property.
4. Estimate the fair price of an option on the property for a specified period of time, say one year.
5. The value of the loss is the present worth of the option payments for the number of periods the use of the property is denied.

Rental value is the standard method for estimating the worth of an option or other temporary transfer of real property rights.

I have made a preliminary investigation and analysis which allows me to state that highest and best use of the subject property is for a residential subdivision.

I have found and tabulated a number of comparable land sales. Within the time

available I have not been able to complete the analysis necessary to form an opinion about the fair market value of the property at the date of the taking. That information will be forthcoming.

Yours very truly,

R. J. Frank & Associates

/s/V. Hugh LeGall
V. Hugh LeGall, S.R.E.A.

VHL:na
encs.
Our No. 2186

HAPPY VALLEY - FUJIMOTO - EISERT PROPERTY ANALYSIS

These properties, identified as Tax Lots 100, 500, 1700, 1800, 1801, and 2300, Section 35, T1S, R2E, W.M., contain 91.92 acres in the south central area of the City of Happy Valley.

Topographically the property ranges from 370 feet in elevation at the southwest

corner of the Eisert property to a high of 655 feet on the east end of the Fujimoto property. Slopes vary from 2% to in excess of 25% in some areas.

Independent investigation by a soil scientist indicates the only area suitable for individual septic tanks and drainfields lies along the ridge running north and south at the east end of both parcels.

Although sewers are readily available in the area, the city has no plan for the provision of public sewers at this time.

Clackamas County standards require a minimum of two ares for individual disposal systems in soils exhibiting the characteristics of these soils.

A public water supply is available in the city.

Access to the buildable portions of the site would require construction of at least 2,000 feet of street with drainage and public water from 122-129th, before reaching the area suitable for development. Construction of a street system required to serve the approximately ten building sites would be in addition to the access road construction.

Assuming a higher than average grading cost due to the slope of the ground (with grades approaching 15%), and further assuming added costs to provide approved road drainage, it could cost in excess of $150,000 just to get to the building sites, without their frontage improvements. These costs would include providing a road to Standard Area II Drawing Number R5026G, plus a six inch waterline.

Although the City Comprehensive Plan Text refers to a Planned Unit Development as a desirable method of providing housing sites and open space, no enabling ordinance establishing standards has been adopted.

CONCLUSION:

Under conditions as they exist today, these properties have no reasonable, economic use for residential purposes. Without public sewers to serve those areas identified as unsuitable for septic tank and drainfields, these lands cannot be developed economically.

HAPPY VALLEY - GUY PROPERTY ANALYSIS

This property, identified as Tax Lot 900, Section 27 CB, T1S, R2E, W.M., lies in the northwest corner of the City of Happy Valley, on the slope of Mt. Scott.

Topographically the land is moderately steep to steep, with slopes ranging from 12% to in excess of 25%.

Those areas with slopes in excess of 25% are considered unsuitable for sewage disposal by individual septic tanks, according to DEQ rules. Slightly less than 20 acres (19.68±) of the 29.92 acre parcel are within that category.

The balance (about 10.24 acres) has a slope less than 25%, but exhibits soil characteristics which indicate those areas are not suitable for sub surface disposal systems. Identified characteristics include soil mottling, perched ground water and restrictive layers, which indicate the area is unsuitable for septic tanks or drainfields.

Although sewers are readily available in the area, the city has no plan for the

provision of public sewers at this time.

The area is currently limited to a minimum lot size of 1.5 acres per living unit, by city regulations.

The property will not support agriculture due to soils, slope and moisture.

A public water supply is available in the vicinity.

Access to the site from Idleman Road and View Drive is good.

CONCLUSION:

Until this property is provided with public sewers and a density of development is allowed which makes installation of those sewers economically feasible, this property has no economic use.

CERTIFICATE OF SERVICE

I hereby certify that on this_____ day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Margaret Leek Leiberan and Stephen F. English, One Southwest Columbia, Portland, Oregon 97258, counsel for Respondents. I further certify that all parties required to be served have been served.

MORGAN & SHONKWILER, P. C.

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